Supreme Court, U. S.
FILED
NOV 1 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-566

GERALDINE POWELL,

Petitioner,

— *v.* —

SYRACUSE UNIVERSITY, DOCTOR MELVIN EGGERS, CHANCELLOR OF SYRACUSE UNIVERSITY, SCHOOL OF ARCHITECTURE, A SUB-UNIT OF SYRACUSE UNIVERSITY, JULIO SAN JOSE, ACTING DEAN OF THE SCHOOL OF ARCHITECTURE, SYRACUSE UNIVERSITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 580 F.2d 1150.

QUESTION PRESENTED

In rejecting petitioner's Title VII claim of racial discrimination, did the courts below apply the proper analysis of a defendant's burden of proof in the rebuttal of a prima facie case of discrimination?

STATEMENT OF CASE

This action was brought in the United States District Court for the Northern District of New York against respondents Syracuse University, the School of Architecture, and two present administrators, alleging discrimination in appellant's separation from employment based on race and sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

Before filing suit in the District Court, appellant Geraldine Powell, a former part-time faculty member of the School of Architecture, had filed a claim with the New York State Division of Human Rights against the University and present and former administrators, alleging unlawful discrimination in employment based on race, color, and sex. After five days of public hearings, the Division of Human Rights found there had been no discrimination and dismissed the complaint. No appeal was taken from this decision.

Following discovery, the parties entered into a stipulation submitting the case to the District Court upon the transcript of plaintiff's administrative hearings before the New York State Division of Human Rights, stipulated facts and exhibits, and the parties' briefs (A-3a).[1]

The District Court ordered the complaint dismissed after finding that plaintiff had failed to prove a prima facie case of discrimination and that, even assuming a prima facie case had been proven, the respondents had rebutted the prima facie case by proving that petitioner was terminated for legitimate non-discriminatory reasons (A-19a).

[1] All page references, unless otherwise indicated, are to the petitioner's petition for a writ of certiorari. References to pages of the body of that petition are indicated by a single numeral. References to pages of the appendices of the petition are marked with an "A".

The Court of Appeals affirmed the judgment of the District Court based on the conclusion that petitioner failed to sustain the burden of proving that her termination was the result, in whole or in part, of racial or sexual animus (A-39a). The Court of Appeals concluded that petitioner had established a prima facie case under this Court's analysis in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), but that respondents had successfully rebutted petitioner's proof by articulating legitimate, non-discriminatory reasons for termination of her employment (A-37a).

The findings of fact contained in the District Court's decision and discussed in the Court of Appeals opinion are unequivocal: Petitioner's employment was terminated based on the Architecture School's Tenure Committee determination that petitioner's ". . . performance fell short of teaching requirements, after affording her a fair opportunity to demonstrate her teaching ability. This determination was devoid of any racist or sexist base" (A-19a).

Contrary to petitioner's repeated assertions that " . . . the only evidentially documented factors discussed at the time of the adverse employment decision were race oriented. . .", the facts indicate that the Tenure Committee considered the issue of black architecture as an academic pursuit. Petitioner's *own* race is totally irrelevant to this consideration and plaintiff's Exhibit #14 in the Record (A-44a) reveals that the Committee considered only work-related factors.

Furthermore, all eight Committee members who voted against the petitioner's continuation as a faculty member testified before the New York Division of Human Rights as to the reasons for their votes (A-8a and A-9a; A-28a and A-29a). All of these members testified that their vote was not influenced by racial or sexual factors (A-9a; A-29a). The reasons given by these members for petitioner's termination were work-related reasons, such as petitioner's lack of teaching qualifications and the poor work of petitioner's architecture students (A-8a and A-9a).

Petitioner misstates the District Court's findings regarding the testimony of Professor Lee (a Tenure Committee member) by asserting that neither Professor Schueller nor Professor Lee voted against petitioner based on evaluation of her students' work (6). The District Court, instead, found that:

> Professor Lee, the only black member of the Tenure Committee, voted against continuing plaintiff on the basis of her students' work, which he felt was not sufficiently developed to permit them to continue their architecture education . . . , and on the basis of his observations of plaintiff's studio. (A-9a).

Petitioner claims that "[t]he ultimate consequence of the decision below is to insulate largely white University committees from the scrutiny of a federal court . . ." (7). However, it must be recalled that the instant case is one in which petitioner's claim of race and sex discrimination has been scrutinized by the New York State Division of Human Rights including a hearing resulting in a finding of no discrimination. In addition, there has been an independent federal District Court trial, and an appellate affirmance of the District Court's finding of no discrimination.

REASONS FOR DENYING THE WRIT

I. In Title VII cases alleging disparate treatment of an individual on the basis of race or sex, the law is settled that once the plaintiff proves a prima facie case, defendant in rebuttal need only articulate some legitimate, nondiscriminatory reason for its actions.

On three occasions this Court has discussed what proof by an employer will rebut a plaintiff's prima facie case of discrimination, petitioner's claim to the contrary notwithstanding. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Furnco Construction Corp.* v. *Waters*, _____ U.S. _____, 98 S. Ct. 2943 (1978). In light of these cases, petitioner's suggestion, that an employer must establish by "clear and convincing" evidence its articulated nondiscriminatory reasons for the termination of an employee, is specious.

A. Proof of a prima facie case of racial discrimination permits only an inference of discrimination, which may be rebutted by an articulation of a legitimate nondiscriminatory reason for the action of the employer.

The starting point for any discussion of the burden of proof in individual employment discrimination cases is *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

In *McDonnell Douglas*, this Court dealt with a claim of racial discrimination in the hiring procedures of an employer.[2] The Court, in treating the issue of the order and allocation of proof in a private, non-class action challenging employment discrimination, laid down a framework for the guidance of lower courts. The Court first set forth four requirements for establishing a prima facie case of racial discrimination. Assuming arguendo that plaintiff in this case has met these requirements,[3] the *McDonnell Douglas* framework continued with a discussion of the employer's burden of proof in rebutting the plaintiff's prima facie case. The Court said:

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[2] The principles of *McDonnell Douglas* have been applied to discharge cases although *McDonnell Douglas* itself involved a Title VII action challenging a refusal to hire. *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976); *Garrett* v. *Mobil Oil Corp.*, 531 F.2d 892 (8th Cir. 1976); *Potter* v. *Goodwill Industries*, 518 F.2d 864 (6th Cir. 1975); *Long* v. *Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974).

[3] The District Court, in the words of the Second Circuit Court of Appeals, believed that plaintiff had failed to make out a prima facie case for two reasons. The District Court felt that Ms. Powell had failed to prove that she was qualified to teach on the architecture faculty, given the negative faculty evaluations of her work. In addition, the District Court held that Ms. Powell had failed to demonstrate that other individuals possessing similar qualifications were hired after Powell was fired

> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employer's rejection . . . Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. *We think that this suffices to discharge petitioner's burden of proof at this stage* and to meet respondent's prima facie case of discrimination. 411 U.S. 792, 802-803.
>
> (emphasis added)[4]

The third and final part of the *McDonnell Douglas* framework deals with the situation where the employer has successfully met a Title VII plaintiff's prima facie case. The Court said that the plaintiff

> . . . must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were, in fact, a coverup for a racially discriminatory decision. 411 U.S. 792, 805.

Thus, proof of pretext is an integral part of the *McDonnell Douglas* framework.

Petitioner's argument that an employer should be required to adduce "clear and convincing" evidence to rebut a prima facie

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Footnote 3 (cont'd.)

(A-34a; see also A-17a through A-19a). Circuit Judge Moore, in concurring in the Second Circuit judgment below, also believed that Ms. Powell did not even establish a prima facie case. Judge Moore said that ". . . Powell did not prove that she was qualified for the job for which Syracuse University was seeking applicants and that Syracuse University continued to seek applicants with Powell's qualifications" (A-41a).

[4] In *McDonnell Douglas*, the Court also rejected the view of the Eighth Circuit Court of Appeals that because the employer's reason for refusal to rehire the employee was "subjective", it was a reason that carried little weight in rebutting charges of discrimination. 411 U.S. 792, 803.

case of racial discrimination totally ignores the final portion of the *McDonnell Douglas* burden of proof framework.[5] If the respondents had to prove "clearly and convincingly" that its articulated race neutral reasons were, in fact, the reasons for petitioner's discharge, the petitioner would confront the necessity of overcoming this proof to show that the respondents' stated reasons were pretextual. Requiring "clear and convincing" evidence at the second step of the *McDonnell Douglas* framework could render futile the attempt to prove pretext at the third step. Indeed, acceptance of petitioner's argument is tantamount to removing the third step from the *McDonnell Douglas* framework.

McDonnell Douglas therefore compels the conclusion that only an inference of discrimination is raised by a prima facie showing of discrimination by a Title VII plaintiff. Far from having to produce clear and convincing evidence to rebut a prima facie case, an employer need only come forward with some credible evidence, e.g., articulate a nondiscriminatory reason for its actions. The ultimate issue in a disparate treatment case is discriminatory motivation or intent, and under *McDonnell Douglas*, the burden of persuasion for making that showing remains always on the plaintiff.

Subsequent Supreme Court cases reinforce the conclusion that a Title VII plaintiff bears the ultimate burden of persuasion.

In *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the court discussed the burden of proof in a Title VII sex-based discrimination suit. In the course of that discussion, the Court said:

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[5] Although petitioner had the opportunity to prove that the respondents' reasons for her discharge were pretextual, she failed to do so. Petitioner is now asking this Court to alter the respondents' burden of proof in the rebuttal of her prima facie case in order to avoid the effects of her failure to prove pretext.

> Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing the acts they complain of constituted discrimination in violation of Title VII. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, 93 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975); *McDonnell Douglas* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668 (1973). 429 U.S. 125, 137, fn. 14.

The Court in *Gilbert* thus interpreted its *McDonnell Douglas* burden of proof framework as not disturbing the traditional civil litigation burden of persuasion placed upon a plaintiff. If the plaintiff in a Title VII suit bears the burden of persuasion on the issue of whether an employer's acts constitute discrimination, as *Gilbert* clearly indicates, petitioner's argument that an employer must prove that the reasons for the employer's actions were not discriminatory (and by "clear and convincing" evidence, moreover) is certainly erroneous.

The Court's very recent decision in *Furnco Construction Corp.* v. *Waters*, _____ U.S. _____, 98 S. Ct. 2943 (1978) also points out the fallacy of petitioner's argument. In considering a Title VII racial discrimination in hiring suit, the Court explained again that the word "inference" describes the effect of a prima facie showing by a plaintiff.

> A prima facie case under *McDonnell Douglas* raises an *inference* of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors . . . To dispel the adverse *inference* from a prima facie showing under *McDonnell Douglas*, the employer need only "articulate some legitimate nondiscriminatory reason for the employee's rejection." 98 S. Ct. 2943, 2949-2950. (emphasis added)

Furnco supports the conclusion that a *McDonnell Douglas* prima facie case gives rise only to an "inference" of discrimination. An inference is nothing more than a permissible deduction and does not result in a shifting of the burden of persuasion. Again, the Court has indicated that the burden of

persuasion rests always with the plaintiff in a Title VII case. The defendant-employer need only come forward with some credible evidence, by articulating a legitimate nondiscriminatory reason for its actions, to adequately rebut plaintiff's prima facie case. The plaintiff may then proceed to show that the articulated reasons are pretextual.

B. Clear and convincing evidence is used as a measure of the sufficiency of evidence, in the context of racial discrimination in employment, in only exceptional types of situations which are not presented by this case.

Petitioner's statement of reasons for granting a writ of certiorari cites (at pages 9-11 of her petition) two lines of cases where the courts have applied a "clear and convincing" standard of evidence in the context of racially motivated employment decisions. Neither line of cases has any relevance to the instant case.

Petitioner cites *Baker* v. *Columbus Municipal Separate School District*, 329 F. Supp. 706 (N.D. Miss. 1971) and other cases for the proposition that once a plaintiff has established a prima facie case of race discrimination in employment, the defendant has the burden to produce clear and convincing evidence to rebut plaintiff's case. Petitioner, however, fails to mention the narrow context of the cases that are cited. The cases cited by petitioner (on page 9 of the petition) involved the narrow situation of an ongoing conversion from a dual, segregated school system to a unitary system. A long history of *proven* race discrimination, coupled with sudden, disproportionate decimation of the ranks of black teachers when integration was finally begun, led the courts in the cases cited to conclude there had been discriminatory intent. Only clear and convincing evidence could rebut such a showing. No such facts are present in the case at bar.

Nor is the present case even remotely similar to *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), cited on page 10

of the petition for certiorari. *Keyes* involved a situation wherein a school board was found to have intentionally segregated part of the school system. In that context, the Court said that a finding of intentional segregative school board actions in a substantial portion of the school system established a prima facie case of unlawful segregative design by the school authorities in regard to other parts of the school system, and shifted the burden of proof to the school board. Once again, the context of the case was school desegregation with a backdrop of *proven* past discrimination.

The present case, where one individual claims that an isolated instance of bias in employment has occurred, is an entirely different type of case and is covered by the *McDonnell Douglas* burden of proof framework which contains no requirement for "clear and convincing evidence."

A second line of cases is cited by petitioner in the footnote on pages 10-11 of her petition to support the contention that clear and convincing evidence is required to rebut a prima facie showing of racial discrimination in employment. The burden of proof issue in these cases involves the question of who is entitled to a remedy when a plaintiff has already *proven* discrimination on the part of the employer (generally, the plaintiff has proven discrimination against a class of employees). In this context, once an individual shows he is a member of the affected class, it is presumed that individual injunctive relief and back pay is a proper remedy. The employer may rebut the presumption with clear and convincing evidence that the individual discriminatee would not have been hired (or promoted) even absent the proven discrimination.

In all of these cases, therefore, an employer had already been adjudged guilty of discriminatory practices; the only question was the proper remedy for an alleged discriminatee. In that limited context, the burden of proof shifted to the employer to escape the presumption that some type of relief would be granted to the discriminatee.

In the present case, conversely, the District Court found that plaintiff had not even made out a prima facie case of discrimination. The Second Circuit Court of Appeals concluded that a prima facie case had been shown, but found that the respondents had effectively rebutted plaintiff's case. Neither court found any unlawful discrimination by the respondents. The cases cited in the footnote of pages 10-11 of the petition for certiorari, therefore, are inapposite.

A recent Fifth Circuit case, cited by petitioner, directly rejects the contention that the burden of persuasion shifts to the employer to rebut a prima facie case by clear and convincing evidence. In *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977), a discharged black employee brought suit alleging violations of Title VII and 42 U.S.C. § 1981. The district court, in the words of the Fifth Circuit Court of Appeals, had held that the employee had established a prima facie case and that the employer, Texas Instruments (TI), in rebuttal had failed to prove by clear and convincing evidence that the employer had not discriminated against the employee (555 F.2d 1251, 1254).

The Fifth Circuit, while holding that an employer bears the burden of proving legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence, rejected the district court's formulation of the employer's burden of proof for the effective rebuttal of a prima facie case:

> *The district court clearly erred in requiring TI to establish legitimate reasons for its actions by "clear and convincing" evidence* . . . Turner's statement of a prima facie case shifted to TI the burden of articulating legitimate, nondiscriminatory reasons for its action. It was not required, as the district court indicated, to present clear and convincing evidence of such reasons. *We find no justification for casting upon the employer the extraordinary burden of proving his reasons by "clear and convincing" evidence,* the highest standard of proof applied in civil cases. 555 F.2d 1251, 1254-1255. (emphasis added)

II. The Second Circuit Court of Appeals applied the proper analysis of a defendant employer's burden in rebutting a prima facie Title VII case of racial discrimination.

The Court of Appeals made clear that it was applying the *McDonnell Douglas* framework regarding the order and allocation of proof in a Title VII suit. The Court, in fact, laid out anew the framework of *McDonnell Douglas* in its opinion, and recognized that once a prima facie case of racial discrimination had been made out, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection (A-33a and A-34a).

In determining the issue whether, on the present state of the record, the respondents had successfully rebutted the plaintiff's showing of a prima facie case, the Second Circuit panel noted the trial court's findings:

> [A] contract for the academic year 1974-75 was not offered to [the appellant] for one reason only. The Tenure Committee honestly reached the conclusion that plaintiff's performance fell short of teaching requirements, after affording her a fair opportunity to demonstrate her teaching ability. This determination was devoid of any racist or sexist base. The plaintiff has not demonstrated the assigned reason to be a pretext for prohibited discriminatory conduct. All of the eight members of the Tenure Committee who voted against plaintiff testified that they voted to terminate plaintiff essentially because of the poor work product of her rendering students, and her inadequate architectural background. These are matters of obvious concern to the architecture faculty and, therefore, are unquestionably legitimate reasons for the vote. (A-37a and A-38a).

The Second Circuit affirmed the district court's holding that the plaintiff's prima facie case had been successfully rebutted. The court emphasized its careful, independent review of the record when it said:

> . . . after a careful review of the record, we cannot say that the trial court's finding in the instant case is clearly erroneous. The court considered testimony by all eight members of the Tenure Committee, and was unable to discern either overt or covert discrimination on the part of those officials. And our own independent review of the record confirms these findings, which are supported by substantial evidence . . . the record here simply does not support the appellant's contention that her termination was the result, in whole or in part, of racial or sexual animus.
>
> Accordingly, we affirm the judgment of the district court. (A-38a and A-39a).

It is clear from the opinion of the Court of Appeals below, therefore, that "substantial evidence" supports the finding that there were legitimate, nondiscriminatory reasons for the termination of plaintiff Powell. In the light of the teaching of *McDonnell Douglas* that an employer need only articulate legitimate reasons to rebut plaintiff's prima facie case, and given the absence of any showing by Ms. Powell that the articulated reasons were pretextual, the Court of Appeals' affirmance of the District Court was unquestionably correct. Even assuming arguendo that not merely the burden of going forward but also the burden of persuasion shifted to the employer to show a lack of discrimination, substantial evidence was adduced to prove that there existed *no* overt or covert discrimination.[6]

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[6] Petitioner reiterates that race was the sole factor, or a significant factor, considered when the Tenure Committee discussed petitioner's future and made the decision adverse to petitioner. Petitioner ignores the fact that, as the District Court noted, "This discussion . . . was in response to plaintiff's submitted statement which postulated the existence of a 'black aesthetic' and called for recognition of a black perspective for understanding the needs of the black community and black students. Any committee discussion which then made reference to race followed naturally from the reading of the statement. After plaintiff injected the question of black values into the committee's consideration of her, she should not expect them

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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Footnote 6 (cont'd.)

to ignore the ideas she presented" (A-10a). Both courts below clearly concluded that petitioner's own race did *not* enter into the Tenure Committee's decision at all. The Court of Appeals, as mentioned above, held that substantial evidence was shown to prove there existed neither covert nor overt discrimination, *in whole or in part*, and the cases cited by petitioner at pages 17-18 of her petition are, therefore, inapposite.

This quantum of evidence unquestionably satisfied the employer's burden in rebuttal, whether that burden was merely to come forward with some evidence or to prove by a preponderance of evidence that there had been no discrimination. The Court of Appeals correctly so held.

CERTIFICATE OF SERVICE

Tracy H. Ferguson, Esq., one of the attorneys for the Respondents herein, certifies that on the 31st day of October, 1978, I did serve three copies of the foregoing Brief in Opposition upon the attorneys for the Petitioner by mailing the same, postage prepaid, first class, as follows:

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